

NIH POLICY MANUAL

6009-1 - CONTRACTING OFFICER'S RESPONSIBILITY IN VERIFICATION OF CONFLICTS OF INTEREST IN ADVISORY AND ASSISTANCE SERVICE (A&AS) AND OTHER CONTRACTS

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1. **Explanation of Material Transmitted:** The purpose of this chapter is to provide guidance to NIH contracting staff concerning their responsibility to identify, verify, and prevent potential conflicts of interest on the part of consultants under A&AS contracts, independent contractors, known as marketing consultants, furnishing advice to an offeror or any other contractor in support of preparation or submission of an offer to the NIH, and staff proposed by an offeror in response to a solicitation issued by the NIH.

1. **Filing Instructions:**

Remove: I&I Memorandum DCG 91-5, Contracting Officer's Responsibility in Verification of Conflicts of Interest in Advisory and Assistance (A&AS) and Other Contracts, dated 11/25/91

Insert: NIH Manual 6009-1, Contracting Officer's Responsibility in Verification of Conflicts of Interest in Advisory and Assistance (A&AS) and Other Contracts, dated 02/05/95

1. **Distribution:** NIH Manual Mailing Keys F-401 and F-407

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A. Purpose:

The purpose of this Manual Chapter is to provide guidance to NIH contracting officers concerning their responsibility in identifying, verifying, and preventing potential conflicts of interest on the part of:

1. Persons who provide consulting services under A&AS contracts.
2. Independent contractors, known as marketing consultants, furnishing advice to an offeror or any other contractor in support of the preparation or submission of an offer to the NIH.
3. Staff proposed by an offeror in response to a solicitation issued by the NIH.

B. Background:

Responsibility for identifying and preventing potential conflicts of interest in Government contracts is shared among the contracting officer, the program staff initiating the request, review staff, and other Government officials with involvement in activities directly related to the procurement.

The references in paragraph [D](#). below, include policies and procedures that the NIH staff must follow in implementing conflict of interest, confidentiality, and integrity rules affecting evaluators of scientific, or technical merit evaluations on NIH contract and subcontract proposals, or active projects under NIH awards. Recent Inspector General concerns regarding possibilities of conflicts of interest among persons who provide consulting services to the NIH under A&AS contracts or who are employees of a contractor performing on NIH contracts has resulted in the need for promoting awareness among affected NIH staff of the existing conflict of interest requirements.

C. Policy:

FAR 9.507 requires the contracting officer to take certain actions with regard to advisory and assistance solicitations and contracts in excess of \$25,000. It also requires the contracting officer to determine if there are any organizational conflicts of interests in solicitations, other than sealed bids, where the contract amount is expected to exceed \$200,000.

D. References:

1. FAR 9.5, Organizational and Consultant Conflicts of Interest.
2. FAR 37.2, Advisory and Assistance Services.
3. OFPP Policy Letter 89-1, Conflict of Interest Policies Applicable to Consultants, issued 12/8/89.
4. HHSAR 315.406-5(b)(2)(iv), Technical Proposal Instructions.

5. I&I Memorandum OER 91-1 and DCG 91-2, Procurement Integrity Act, Conflict of Interest, and Confidentiality Certification Implications for Individuals Evaluating the Scientific and Technical Merit of NIH Contract Proposals.

6. I&I Memorandum OD 90-1, Conflict of Interest and Confidentiality Certifications for Evaluations of Grant and Cooperative Agreement Applications, Contract and Subcontract Proposals, and Active Projects.

E. Definitions:

1. Conflict of Interest - that condition or circumstance wherein a person is unable or is potentially unable to render impartial assistance or advice to the Government because of other activities or relationships with other persons, or wherein a person has an unfair competitive advantage. (OMB Policy Letter 89-1 definition.)
2. Advisory and Assistance Services (A&AS) (also known as consultant services) - those services acquired from non-Government sources by contract or by personnel appointment to support or improve agency policy development, decision-making, management, and administration, or to support or improve the operation of management systems. Such services may take the form of information, advice, opinions, alternatives, conclusions, recommendations, training, and direct assistance. A&AS includes consultant services provided by individuals, as defined in the Code of Federal Regulations, Chapter 304.
3. Consultants - persons possessing special, current knowledge or skill, which may be combined with extensive operational experience. This enables them to provide information, opinions, advice, or recommendations to enhance understanding of complex issues or to improve the quality and timeliness of policy development or decision-making.
4. Marketing Consultant - any independent contractor who furnishes advice, information, direction, or assistance to any other contractor in support of the preparation or submission of an offer for a Government contract by that offeror. (FAR 9.501 definition.)

F. Procedures:

1. Advisory and Assistance Service Contracts:

- a. FAR 9.507-1 requires the contracting officer to insert the provision at FAR 52.209-8, Organizational Conflicts of Interest Certificate - Advisory and Assistance Services in solicitations for A&AS if the contract is expected to exceed \$25,000.
- b. All A&AS contracts that exceed \$25,000, require that the apparent successful offeror provide certified information describing the nature and extent of any conflicts of interest that may exist with respect to the proposed award.

[Appendix 1](#) provides the certification required by FAR 52.209-8, which must be

completed by the apparent successful offeror and returned to the contracting officer prior to award.

c. The contracting officer, along with cognizant program and review staff, and if necessary other appropriate NIH officials, must determine whether a conflict of interest exists with regard to the proposed A&AS contract staff before an award of the contract is made, based on information provided by the apparent successful offeror in its certificate. The contract file must be documented to reflect the contracting officer's determination. (NOTE: It is recommended that this documentation be placed in the Summary of Negotiations.)

Should questions arise concerning the contents of the certification, the contracting officer shall notify the offeror proposing the A&AS and provide the offeror a reasonable opportunity to respond. Any findings shall be documented and become part of the contract file. The certificate required under FAR 52.209-8, shall be maintained in the contract file.

2. Marketing Consultants Employed by Contractors

a. OFPP Policy Letter 89-1 as implemented by FAR 9.5, requires that marketing consultants certify that they have provided no information to the contractor employing them that would give the contractor an unfair competitive advantage.

b. FAR 9.507-1 requires that the contracting officer insert the provision at FAR 52.209-7, Organizational Conflict of Interest Certificate - Marketing Consultants, in solicitations, other than sealed bids, if the contract amount is expected to exceed \$200,000.

c. The individual or firm that employs, retains, or has a contractual arrangement with one or more marketing consultant in connection with a contract and which is the apparent successful offeror, must submit to the contracting officer the certificate identified at FAR 52.209-7 for each of its marketing consultants.

Appendix 2 provides the certification required by FAR 52.209-7, which must be completed by the apparent successful offeror prior to award.

In addition, the apparent successful offeror must forward to the contracting officer a certificate signed by the marketing consultant that the marketing consultant is aware of FAR 9.5 and OFPP Policy Letter 89-1, and that the marketing consultant has provided no unfair competitive advantage to the prime contractor with respect to services rendered, or to be rendered in connection with the solicitation, or that any unfair competitive advantage that does exist has been disclosed to the offeror.

d. In the same manner as in F.1.c. above, based on the information provided by the apparent successful offeror in the certificate(s) it submits, the contracting officer must determine whether an unfair competitive advantage exists with respect to services provided by a marketing consultant in connection with a particular contract action, documenting the contract file accordingly.

- e. All marketing consultant certificates and any associated documentation shall become part of the contract file.

3. Exclusions

Certain types of acquisitions are excluded from the requirements of FAR 9.5. These include:

- a. Routine engineering and technical services (such as installation, operation, or maintenance of systems, equipment, software, components or facilities).
- b. Routine legal, actuarial, auditing and accounting services.
- c. Training services.
- d. Services rendered in connection with intelligence activities as defined in Section 3.4(e) of Executive Order 12333 or a comparable definitional section in any successor order, or in connection with special access programs.
- e. Acquisitions subject to unique agency organizational conflict of interest statutes.

In addition to these exclusions, please refer to the exclusions cited in FAR Subpart 37.2.

4. Waivers

A waiver to the Organizational and Consultant Conflict of Interest general rules or procedures may be granted by the agency head or a designee (not below the level of head of a contracting activity). The requirements for the request for waiver are addressed in FAR 9.503.

5. All Other Contracts:

- a. The technical proposal instructions must be developed to suit the needs of an individual acquisition, permitting proposal evaluators to determine a proposal's acceptability. For purposes of evaluating the qualifications, experience and resources of proposed personnel, the technical instructions may include the following statement:

"In accordance with HHSAR 315.406-5(b)(2)(iv), the technical proposal must include a list of names and proposed duties of the professional personnel, consultants, and key subcontractor employees assigned to the project. Their resumes should be included and should contain information on education, background, recent experience and specific scientific or technical accomplishments."

- b. Should any evidence of existing or potential conflicts of interest be manifested as a result of a review of the documents submitted in response to the technical proposal instructions, or to the information submitted under 5.c. below, the contracting officer, in concert with program and other appropriate NIH, and peer

review officials in the case of biomedical and behavioral R&D and R&D support requirements, (where appropriate), shall investigate, arriving at a determination concerning the existence of conflicts of interest.

c. Based on the type of requirement being solicited, the contracting officer shall assure that the resultant RFP contain a Summary of Related Activities (See NCI and APDS RFP preparation workforms, Section J., List of Attachments). This summary requires offerors to submit specific information pertaining to the Project Director, Principal Investigator and other proposed key professional individuals designated for performance under any resulting contract. For each aforementioned individual, an identification must be made of all active federal contracts/cooperative agreements/grants and commercial agreements plus outstanding proposals submitted by their organizations. The primary purpose of this information is to enable the contracting officer, program staff, and peer review group members (if applicable) to assess and evaluate the committed levels of effort for the offeror's proposed staff.

d. The contracting officer is alerted to the requirements in FAR 9.507-1 and 9.507-2 for the drafting and inclusion of solicitation provisions and contract clauses that would impose appropriate restraints upon the contractor's eligibility for future contracts or subcontracts in cases where questions concerning organizational conflicts of interest may arise or must be resolved as a condition of award.

Appendix 1:

ORGANIZATIONAL CONFLICTS OF INTEREST CERTIFICATE - ADVISORY AND ASSISTANCE SERVICES

In accordance with the requirements of FAR 52.209-8, Organizations Conflicts of Interest Certificate - Advisory and Assistance Services (November 1991), and the Office of Federal Procurement Policy Letter 89-1, Conflict of Interest Policies Applicable to Consultants, as a condition of award of a contract, the apparent successful offeror submits to the contracting officer the certificate below:

Solicitation No. *(Insert RFP No.)*, with *(Insert ICD)*
for *(Provide a brief description of services to be provided)*

1. Apparent Successful Offeror Name:

Address:

Telephone No. including area code:

Federal Taxpayer Identification No.:

2. Please list below (or use additional paper if necessary), the name, address, telephone number of the client(s), a description of the services rendered to the previous client(s), and the name of a responsible officer/employee of the offeror who is knowledgeable about the services rendered to each client, if, in the 12[1] months preceding the date of the certification, services were rendered to the Government or any other client, (including any foreign government or person) respecting the same subject matter of the instant solicitation, or directly relating to such subject matter: [Please list the agency

and contract number, if applicable.]

3. The individual signing this certificate below certifies that to the best of his/her knowledge and belief, no actual or potential conflict of interest or unfair competitive advantage exists with respect to the advisory and assistance services to be provided in connection with the instant contract, or that any actual or potential conflict of interest or unfair competitive advantage that does exist with respect to the contract in question has been communicated in writing to the contracting officer or his or her representative.

Name:

Title:

Signature:

Employer's Name:

Employer's Address:

Telephone Number:

In accordance with the requirements of FAR 52.209-7, Organizational Conflicts of Interest - Marketing Consultants (November 1991), and the Office of Federal Procurement Policy (OFPP) Letter 89-1, Conflict of Interest Policies Applicable to Consultants, as a condition of award of a contract. An individual or firm that employs, retains, or engages contractually, one or more marketing consultants in connection with respect to each marketing consultant, the certificate below:

On Solicitation Number (*Insert RFP No.*), with the (*Insert ICD*), NIH

1. The following services have been rendered by, or are to be the following marketing consultant:

a. Name of Marketing Consultant:

b. Address:

c. Telephone No., Including Area Code:

d. Federal Taxpayer Identification No.:

e. Name, Address and Telephone No. of Officer/Employee of Marketing Consultant who has Personal Knowledge of the Marketing Consultant's Involvement in the Contract:

f. Description of Nature of Services:

2. Name, address and telephone of the client(s), name of responsible officer/employee of the marketing consultant who is knowledgeable about the services provided to such client(s), if, based on information provided to the contractor by the marketing consultant, any marketing consultant is rendering or, in the 12[1] months preceding the date of the certificate, has rendered services respecting the same subject matter of the instant solicitation, or directly relating to such subject matter, to the Government or any other client (including any foreign Government or person). (IF NONE, PLEASE INSERT "N/A")

3. The individual signing this certificate below for the prime contractor certifies that he/she has informed the marketing consultant of the existence of Subpart 9.5 of the

FAR and of the OFPP Policy Letter 89-1.

Name:

Title:

Signature:

Employer's Name:

Employer's Address:

Telephone No., Including Area Code:

In addition to this certification, the apparent successful offeror shall forward to the contracting officer a certificate signed by the marketing consultant that the marketing consultant has been informed of the existence of FAR Subpart 9.5 and of OFPP Policy Letter 89-1, and that to the best of the marketing consultant's knowledge and belief, he/she has provided no unfair competitive advantage to the prime contractor with respect to services rendered to be rendered in connection with this solicitation, or that any unfair competitive advantage that does or may exist has been disclosed to the offeror. **THIS CERTIFICATE SHOULD ACCOMPANY THE ABOVE CERTIFICATE EXECUTED BY THE APPARENT SUCCESSFUL OFFEROR AND BE SENT TO THE CONTRACTING OFFICER PRIOR TO AWARD.**

Footnotes:

[1] for Appendix 1, # 2 - If approved by the head of the contracting activity, this period may be increased up to 36 months.

[2] for Appendix 2, # 2 - If approved by the head of the contracting activity, this period may be increased up to 36 months.

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